QUESTIONS PRESENTED

I. Must North Carolina's Congressional Redistricting Plan Undergo Strict Scrutiny Where Race Was A Motivating But Not Predominant Factor In the Drawing of the Districts?

II. Is North Carolina's Congressional Redistricting Plan Justified by Compelling State Interests In Complying With the Voting Rights Act and Remedying Discrimination?

III. Did the Court Below Correctly Hold That North Carolina's Congressional Redistricting Plan Is Narrowly Tailored?

IV. Do the Plaintiffs Have Standing To Challenge North Carolina's Redistricting Plan Where They Have Proven No Injury?

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STATEMENT

I. Prior Proceedings

This Court first considered the legal sufficiency of plaintiffs' claim that North Carolina's congressional redistricting plan violated their right to equal protection of the laws on appeal of a motion to dismiss. The case was remanded to the District Court following this Court's opinion in *Shaw v. Reno,* 113 S.Ct. 2816 (1993). Shortly after remand, Ralph Gingles, the lead plaintiff in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and twenty-one other black and white North Carolina voters,[1] were granted leave to intervene as defendants on September 7, 1993, J.A. 9-10.[2]

Subsequently, the court below allowed eleven registered voters and members of the Republican Party to intervene as plaintiffs, none of whom live in either the 1st or the 12th District J.A. 13. *See* Motion to Intervene by James Arthur "Art" Pope, et. al. at 3-5. The lead plaintiff-intervenor, Art Pope, was also the lead plaintiff in *Pope v. Blue*, 809 F. Supp 392 (W.D.N.C. 1992), *aff'd mem.* 113 S.Ct. 30 (1992), J.S. 10a, 14a, an earlier challenge to the same redistricting plan on the grounds that it was a political gerrymander.

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[1]Sixteen of the defendant-intervenors [hereinafter "Gingles defendants"] live in either the 1st or 12th Congressional Districts, the two majority-minority districts in North Carolina. D.I. Stip. 82.

[2]This brief uses the following abbreviations:

J.A.	- Joint Appendix
J.S. __a	- Appendix to Jurisdictional Statement (opinion below)
Tt.	- Transcript of trial, March 28 - April 4, 1994
Ex.	- Trial Exhibit
Stip.	- Stipulations by the Parties (signed by all parties March 21, 1994)
D.I. Stip.	- Stipulations Offered by Defendant-Intervenors (signed by all parties March 21, 1994)
Dep.	- Depositions received in evidence

At trial before the three-judge court, extensive oral and documentary evidence was presented by all parties, including testimony received in the form of written narrative statements and depositions. J.S. 15a, n.8. On August 22, 1994, the court below ruled that the congressional redistricting plan was narrowly tailored to further one or more compelling state interests. J.S. 111a. The plaintiffs and plaintiff-intervenors now appeal that ruling.

II. Facts

The redistricting plan adopted by the North Carolina General Assembly in January 1992 (Chapter 7) provides African-American voters an equal opportunity to elect candidates of their choice to Congress for the first time in this century, by creating two districts with a bare majority of African-American voters. At the time Chapter 7 was enacted, blacks constituted 50.53% of the registered voters in the 1st District and 53.54% of the registered voters in the 12th District. J.S. 108a, J.A. 553. African-Americans are only a slight majority of the voting age population in the two districts, comprising 53.40% and 53.34% of the total voting age population in the 1st and 12th Districts respectively. J.A. 552. A variety of historical and current circumstances, as well as diverse and legitimate state interests, led to this plan's adoption.

The court below made extensive findings of fact regarding the development and enactment of North Carolina's congressional redistricting plan. J.S. 78a-109a. The court described the legislative setting, J.S. 78a-81a, summarized the basic geographic and demographic features of the state, including the concentration of African-Americans in the Coastal Plain and Piedmont regions, J.S. 81a-83a, reviewed the legislative process, J.S. 84a-88a, identified the motives behind the decision to enact Chapter 7, J.S. 89a-97a, analyzed the six factors that primarily determined the location and shapes of the challenged districts, 97a-102a, and described the

communities of interest recognized by those districts, 102a-105a. The court also evaluated the degree to which the challenged districts provide for fair and effective representation, 105a-106a, and the extent to which the districts are located in areas of the state where previous Voting Rights Act violations have occurred. J.S. 107a-108a.

The State Appellees' Brief provides a comprehensive summary of the evidence presented at trial. *See* State Appellees' Brief at pp. 4-26. Therefore, rather than presenting a detailed factual narrative, we highlight the most significant factual findings of the court below, and the relevant evidence supporting those findings, in conjunction with the Argument.

III. The District Court's Ruling

Granting standing to the plaintiffs as registered voters in North Carolina, the court below subjected North Carolina's redistricting plan to strict scrutiny because the General Assembly deliberately drew two majority-black districts. J.S. 34a, 110a. The court found as a matter of fact that the General Assembly had acted out of a desire to comply with Sections 2 and 5 of the Voting Rights Act. In addition, it found that some, though not a majority of legislators, acted out of a desire to remedy the "state's long and continuing history of race-discrimination in matters of voting." J.S. 108a. The court held that the state had a compelling interest in complying with the Voting Rights Act because there existed a strong basis in evidence for concluding that enactment of a plan with two majority-black districts was necessary to avoid a violation of Sections 2 and 5 of the Voting Rights Act. J.S. 111a. The court also held that the state would have a compelling interest in remedying the effects of past or present racial discrimination, even absent a violation of the Voting Rights Act. J.S. 55a-57a.

Applying the five basic factors used to determine whether a race-based affirmative action program is narrowly tailored, the court held that the state established that the

remedial districts are narrowly tailored to serve the state's compelling interest in complying with the Voting Rights Act while also providing fair and effective representation to all of the state's citizens. J.S. 113a-114a.

SUMMARY OF ARGUMENT

(a) None of the Shaw plaintiffs in this case have standing to challenge the First District, following *United States v. Hays*, 115 S.Ct. 2431 (1995), because they do not live in the First District and have not demonstrated that they have been subjected to racially discriminatory treatment as a result of the creation of that district. Similarly, the Pope plaintiff-intervenors do not have standing to challenge the First or Twelfth Districts because none of them resides in either of those districts. They have not alleged, much less proven, any personal injury that they have suffered as a result of those districts's creation.

The two plaintiffs who live in District 12 do not have standing to challenge that district because they do not allege that they were placed in the district on the basis of the color of their skin. In fact, based on the findings of the court below, they have failed to prove that they have suffered any legally cognizable harm. Instead, the plaintiffs' allegations of harm were "abstract, speculative and merely theoretical". J.S. 21a. Such assertions are insufficient to "demonstrat[e] the individualized harm our standing doctrine requires." *Hays*, 115 S.Ct. at 2436.

(b) North Carolina's congressional redistricting plan should not be subject to strict scrutiny because racial factors did not predominate over all other redistricting goals. The court below made factual findings that the shape, location and composition of the challenged districts resulted from the interplay of six different factors, of which race was only one. J.S. 109a. Applying the standard subsequently articulated in *Miller v. Johnson*, 115 S.Ct. 2475 (1995), to the district court's well-supported findings of fact, the state here defeated the

plaintiffs' claim that District 12 was drawn solely on the basis of race by showing that several factors other than race played a significant role in the decisions about how to fashion the redistricting legislation. *See Miller*, 115 S.Ct. at 2488. Since the district court found that recognizing communities of interest, protecting incumbents, and satisfying several other non-racial goals were not subordinate to racial considerations, plaintiffs' equal protection rights have not been implicated and the plan need not satisfy strict scrutiny.

(c) Although this Court does not need to subject Districts 1 and 12 to strict scrutiny, the fact remains that both districts are justified by three different compelling state interests. First, North Carolina had a compelling interest in complying with Section 2 of the Voting Rights Act because all of the threshold factors required by *Thornburg v. Gingles*, 478 U.S. 30 (1986), and explicitly applied to single-member districts in *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993), were present with regard to North Carolina's congressional districts. Anything less than two majority-black congressional districts would have diluted the voting strength of black voters and denied them an equal opportunity to elect candidates of their choice to the U.S. Congress. Several plans introduced during the legislative process and at the trial of this case demonstrated that it is possible to draw two very regularly-shaped majority-black congressional districts in North Carolina. The evidence was uncontradicted that racially polarized voting exists to such an extent that the candidate of choice of black voters usually is defeated. State legislators debated the meaning of Section 2, and were well aware of the potential liability during the redistricting process.

Second, North Carolina had a compelling interest in complying with Section 5 of the Voting Rights Act because, after conducting its own independent review of the facts, the General Assembly reasonably concluded that the Justice Department's objection to the first plan they passed was not without merit. Unlike the experience in Georgia, the Justice

Department's objection in North Carolina was not based on the state's failure to maximize the number of majority-black districts in the state. Indeed, it is possible to draw three majority-black districts in North Carolina. Rather, the Justice Department concluded that the state's decision to protect incumbents at the expense of creating a second majority-black district might be evidence of purposeful racial discrimination.

Third, the state had a compelling interest in remedying the effects of current racial discrimination in voting patterns and campaign tactics, and ameliorating historical discrimination in previous congressional redistricting that intentionally fragmented the voting strength of black voters. The legislature was aware of the many historical and current barriers to black voters' participation in the political process and had a compelling interest in providing effective representation to the 22% of the state's citizens who had been purposefully disenfranchised in the past.

(d) Districts 1 and 12 are narrowly tailored to appropriately remedy the vote-dilution harms experienced by African-American voters without unduly burdening the rights of third parties. A district's lack of geographic compactness is relevant to the threshold question of whether race predominated in the redistricting process, but has no relevance to the question of whether a redistricting plan is narrowly tailored because there is no constitutional or statutory requirement in North Carolina that congressional districts be geographically compact.

ARGUMENT

I. THE PLAINTIFFS FAILED TO ESTABLISH THAT THEY HAVE STANDING

(a) In the district court the plaintiffs asserted that "[a]ny registered voter in North Carolina ... has standing to

object" to any unconstitutional congressional district.[3] Ruling prior to this Court's decision in *United States v. Hays*, 115 S.Ct. 2431 (1995), the district court sustained this sweeping claim:

> [A]ny person registered to vote in a jurisdiction with a districting plan that contains one or more [allegedly unconstitutional] districts ... has standing to challenge that plan, even if he is not assigned to vote in one of those districts himself.

J.S. 25a-26a. In *Hays*, however, this Court unanimously rejected this very argument. The plaintiffs there also asserted that every voter in Louisiana could challenge the constitutionality of any district.

> We ... reject appellees' position that "anybody in the State has a claim" ... The fact that Act 1 *affects* all Louisiana voters by classifying each of them as a member of a particular congressional district does not mean -- even if Act 1 inflicts race-based injury on *some* Louisiana voters -- that *every* Louisiana voter has standing to challenge Act 1 ...

Hays, 115 S.Ct. at 2435-37 (emphasis in original). Particularly telling for the claim of the *Hays* plaintiffs was that none of them lived in District 4, the district purportedly created in an unconstitutional manner.

Hays is manifestly fatal to the purported standing of any of the plaintiffs here to challenge in this case the constitutionality of District 1. Here, as in *Hays*, none of the plaintiffs actually lives in District 1.[4] *Hays* is equally

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[3]Complaint at 13 (March 12, 1992), J.A.1.

[4]Plaintiffs Shaw and Shimm live in District 12. Plaintiffs Robinson Everett, James Everett and Dorothy Bullock are residents of District 2. Complaint at 4 (March 12, 1992), J.A. 1. Of the plaintiff-intervenors, two live in District 4, three live in District 6, one lives in District 9, and five are residents of District 10. Motion of James Arthur Pope, et al., to

dispositive of *all* claims of the Pope plaintiff-intervenors, since none of those plaintiffs lives in either District 1, or in the other challenged district, District 12.

(b) Two of the Shaw plaintiffs live in District 12. While residence in a challenged district is necessary to establish standing, it is not by itself sufficient. In order to establish standing, "this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Thus, the Court stressed in *Hays* that the plaintiffs there were obligated to demonstrate that they personally had been placed in a disputed district because of their race: "[A]ppellees' argument that "they *do* have a right not to be placed into or excluded from a district because of the color of their skin" ... cannot help them, because they have not established that *they* have suffered such treatment in this case." 115 S.Ct. at 2437 (emphasis in original); see *id.* at 2437 (plaintiffs must establish that they have "*personally* been denied equal treatment") (emphasis in original). *Hays* observed that establishing standing "may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another." 115 S.Ct. at 2436.

The Shaw plaintiffs assert that the state engaged in "flagrant use of race to classify voters." Brief of Appellants Shaw et al., On the Merits, [hereinafter "Shaw Br."] at 22. But the particular voters whom plaintiffs assert were so classified were not the white plaintiffs in this case, but some portion[5] of the *black* voters in District 12. The Shaw plaintiffs

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Intervene as Plaintiffs at 3-5 (September 13, 1993), J.A. 10.

[5]Given the size and distribution of North Carolina's non-white population, thousands of black voters would inevitably have been assigned to an urban 12th District even if the district had been drawn without regard to race.

do not assert that they or any other white voters were "placed into ... district [12] because of the color of their skin." Rather, plaintiffs assert that whites were mere "filler people" (Shaw Br. 22), added to District 12 because they happened to reside in neighborhoods included in District 12 to assure that it was geographically contiguous. Plaintiffs do not claim that the state determined to include in District 12 a particular number of *white* voters, and then assigned plaintiffs to that district because of their race. Rather, plaintiffs assert that they are in District 12 "in spite of," not "because of," their race. *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979).

Hays does not, of course, hold that white residents could never have standing to challenge a deliberately created majority-black district. Such plaintiffs would have suffered a violation of their own right to non-discriminatory treatment if, in violation of the Constitution, whites had been allocated to the district on the basis of race. But this is simply not such a case. The only individuals whom plaintiffs asserted had been assigned to District 12 on the basis of race are black voters. The decisions of this Court preclude plaintiffs from maintaining this action to enforce the rights of such third parties.

(c) In order to establish standing a plaintiff must also demonstrate that the asserted violation actually caused him "injury in fact", a harm which is "concrete and particularized, and ... actual or imminent, not conjectural or hypothetical." *United States v. Hays*, 115 S.Ct. at 2435.

In *Shaw v. Reno*, this Court identified two distinct harms that might be caused by race-based districting. First, the Court observed that such districting "*may* exacerbate ... patterns of racial bloc voting...." *Id.*, 113 S.Ct. at 2827 (emphasis added). *Shaw* also stressed that the existence of such "racial bloc voting ... can never be assumed, but specifically

must be proved in each case." 113 S.Ct. at 2830.[6] Second, the Court noted that where certain race-based districts exist "elected officials are more likely to believe that their primary obligation is to represent" a particular racial group. *Id.*, 113 S.Ct. at 2827.[7] *Hays* recognized that such injuries were a *possible* consequence of race-based districting, but no more than that. Thus, the Court observed that "[v]oters in such districts *may* suffer the special representational harms racial classifications can cause in the voting context." 115 S.Ct. at 2436 (emphasis added). *Hays* stressed that plaintiffs had standing only if *inter alia*, "they have alleged and proven the injury discussed in *Shaw*." 115 S.Ct. at 2437.

The court below observed that the plaintiffs had "not even alleged, much less proved," such concrete injuries. J.S. 21a. Plaintiffs offered no evidence whatsoever that patterns of bloc voting had changed, for good or for ill, since the 1991 enactment of the districting plan in question. The district court found no evidence of any adverse effect on the citizens' interests in effective representation (J.S. 105a[8]), and noted

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[6]*See also Growe v. Emison*, 113 S.Ct. at 1084; *Voinovich v. Quilter*, 113 S.Ct. 1149, 1158 (1993).

[7]*See also Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (court "cannot presume ... without actual proof" that winning candidate will ignore the interests of any group of voters); *White v. Register*, 412 U.S. 755, 767 (1973) (evidence demonstrated representational injury).

[8]The candidates in the challenged districts were able to learn which voters are in their districts, and campaign effectively. Tt. 926-29; Ex. 515; Watt Dep. at 27-31, 53-54; Ex. 502, Clayton Statement at 3-4; Watt Statement at ¶ 14. Similarly, voters were able to learn which districts they live in. Voters in each of the counties in the 12th Congressional district, except for Rowan and Iredell counties, receive voter cards from their county board of elections which indicate their congressional district. Tt. 949-50; Ex. 509-510; J.A. 646-649, Ex. 502, Statements of R. Leeper and E. Emerson.

uncontroverted evidence that the representatives from the lst and 12th congressional districts "had been called upon and had responded more frequently during their terms to requests for services and expressions of views by white than African-American constituents." J.S. 106a n.59. Plaintiffs conceded that they were personal acquaintances of the 12th District Representative, had actually voted for him, were long-time activists in his party, and had never made any unsuccessful efforts to sway his votes or obtain his assistance.[9] The court below concluded that the plaintiffs' "voting rights have been in no legally cognizable way harmed by the plan." J.S. 115a.

The district court mistakenly reasoned, however, that the plaintiffs could establish the requisite harm merely by adding, in their trial court pleadings, "a claim of ... stigmatic injury." J.S. 23a. On the view of the lower court, plaintiffs were under no obligation to adduce any evidence in support of such a claim; rather, it reasoned, the courts are to conclusively presume that such injuries "necessarily" occur whenever there is a violation of equal protection. J.S. 22a. While racial classifications may often cause stigmatic harm, that harm is to the individuals so classified, not to curious bystanders; plaintiffs do not and could not plausibly claim that they were assigned to District 12 on account of their race.

Watt and Clayton have established numerous offices throughout their districts, and utilize mobile offices, toll-free telephone numbers, extended office hours, and various other procedures to make them accessible to constituents. Ex. 502, Clayton Statement at 4-5; Watt Statement at 16. Both representatives make concerted efforts to keep in touch with community leaders, communicate with their constituents through newsletters, J.A. 664-72, community forums and town hall meetings, provide constituent services, and respond to constituent mail. Ex. 502, Statements of Clayton, Watt, Emerson, Lambeth, McGovern, and Offerman.

[9]Shaw Dep. at 7-10, Shimm Dep. at 8-9, 12-13, 39.

With regard to a claim of stigmatic injury, as with any other element of standing, "[t]he party invoking federal jurisdiction bears the burden of establishing" the relevant facts. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e. with the manner and degree of evidence required at the successive stages of the litigation.

Id. The only evidence adduced by plaintiffs was the vague testimony of two plaintiffs that they felt "disenfranchised." The district court dismissed that testimony as "abstract, theoretical, and merely speculative, not concrete and palpable; [it has] the marks of the sort of 'injury in perception' rather than 'in fact' ... that the Supreme Court has previously found insufficient to confer Article III standing." J.S. 22a.[10] That finding is fatal to plaintiffs' assertion of a cognizable emotional injury.

The real gravamen of plaintiffs' opposition to District 12 appears to be that they strenuously object to being in a congressional district in which black voters are, for whatever reason, a majority and in which the successful congressional candidate is non-white.

> [W]e contend that an African-American congressperson in *any* majority-minority district will be induced, consciously or unconsciously, to represent their white constituents less effectively and with less concern than their black constituents.[11]

Plaintiffs maintain that they and other white constituents will be ignored unless their district has either a white majority or a white representative.[12] These racial views, however earnestly adhered to by plaintiffs, were not shared by the framers of the Fourteenth and Fifteenth Amendments. The First Amendment, to be sure, protects the right of plaintiffs or any other person to hold and voice objections to being represented by a member of Congress who is black, hispanic, Asian, or Native American, or to take offense at being placed in a district with a non-white majority. But neither the fact that white voters no longer control the outcome of congressional elections in the Twelfth District of North Carolina, nor the fact that the last election in that district was won by a black candidate, states a cognizable injury under the Equal Protection Clause.

II. THE DISTRICT COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN DETERMINING WHETHER NORTH CAROLINA'S REDISTRICTING PLAN

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[10]The Shaw appellants, quoting this Court's opinion in *Shaw*, assert: These districts "stigmatize individuals by reason of their membership in a racial group and ... incite racial hostility." [*Shaw*, 113 S.Ct.] at 2824. Shaw Br. at 21. In *Shaw* itself, however, the quoted passage is preceded by the words "threaten to", and refers, not to these or any other congressional districts, but to racial distinctions in general. *See also Shaw*, 113 S.Ct. at 2824 (race conscious measures "*may* ... stimulate ... race-consciousness") (emphasis added).

[11]Plaintiffs' Responses to defendants' Third Set of Written Interrogatories, at 11 (Emphasis added); J.A. 679-80. Such insupportable sweeping racial accusations fall far short of the particularized proof required by *Hays* and *Shaw*. In fact, these allegations are the very sort of stereotypes condemned by this Court in *Shaw*.

[12] Plaintiffs attempt to substantiate this position with nothing in the record other than purported testimony by Congressman Watt which they mischaracterize and quote out of context. *Compare* Shaw Br. at 21 n.18 *with* J.A. 511-513.

SHOULD BE SUBJECT TO STRICT SCRUTINY.[13]

(a) The threshold legal issue faced by the district court below concerned the appropriate legal standard to be applied in determining whether a redistricting plan should be subjected to strict scrutiny. The lower court concluded that strict scrutiny must be applied whenever race had played *any* "'motivating' . . . role in the line-drawing process." J.S. 34. Strict scrutiny was required, it insisted, regardless of the extent to which factors other than race might have played an equally or even more significant role in the process. J.S. 26a, 34a. The district court recognized that this rule would require application of strict scrutiny to virtually all districts in the country created to comply with Sections 2 or 5 of the Voting Rights Act, J.S. 37a n.20, and candidly justified the rule as a device to make states hesitate before agreeing to "voluntary compliance with the Voting Rights Act." J.S. 38a.

Shortly after the district court decision in the instant case, the district court in *Miller v. Johnson* rejected that sweeping standard. *See Johnson v. Miller*, 864 F. Supp 1354, 1372 (S.D.Ga. 1994). The Georgia three-judge court held, instead, that strict scrutiny should be limited to redistricting plans whose "predominant" and "overriding" purpose was racial. *Id.* The *Miller* district court expressly disapproved the far broader standard applied by the district court here, reasoning that such a rule would necessitate exacting and intrusive judicial scrutiny of an enormous number of redistricting plans, including virtually any plan adopted by states or localities mindful of their obligations under the Voting Rights Act. 864 F. Supp at 1373.

[13]The court framed the threshold issue as follows: "whether the congressional redistricting plan reflects a legislative intent deliberately to include one or more districts having a particular racial composition of voters." J.S. 84a, n.54.

In *Miller v. Johnson* this Court expressly adopted the narrower standard articulated by the Georgia district court:

> The plaintiff's *burden* is to show . . . that race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district. To make this showing, a plaintiff *must* prove that the legislature subordinated traditional race-neutral districting principles . . . to racial considerations. Where . . . race-neutral considerations . . . are not subordinated to race, a state can "defeat a [plaintiff's threshold claim]."

115 S.Ct. at 2488 (emphasis added).[14]

The standard applied by the district court below was manifestly inconsistent with this Court's subsequent decision in *Miller*. As Justice O'Connor observed in *Miller*, "the threshold standard the Court adopts . . . [is] a demanding one," limited to "extreme instances of gerrymandering." 115 S.Ct. 2497 (concurring opinion). Because the court below utilized an incorrect legal standard in determining whether strict scrutiny applies to North Carolina's redistricting plan, that determination cannot stand.

(b) Whether race (or any other factor) was the "predominant, overriding" consideration in a redistricting plan is, of course, a factual question. A trial court's resolution of that issue is a "factual finding," *Miller*, 115 S.Ct. at 2485, subject to review in this Court only for "clear erro[r]." *Id.*, 115 S.Ct. at 2488. The plaintiffs urge this Court to undertake its own evaluation of the complex and voluminous record in

[14]See *id.* at 2485 ("the overriding and predominant force"; "the predominant, overriding force"), 2486 ("the . . . . dominant and controlling rationale"), 2488 ("predominates"), 2489 ("predominant, overriding desire"; "the predominant factor"; non-racial factors "subordinated to racial objectives"), 2490 (non-racial factors "subordinated to racial tinkering"; "the predominant, overriding factor.")

this case, and to decide de novo whether the factual showing required by *Miller* was made in the trial court.[15] But this Court does not sit to resolve, *de novo* or *nisi prius*, such fact-bound questions.

Ordinarily the district court's error with regard to this threshold legal standard would require a remand of this case for appropriate factual findings utilizing the correct legal standard. *Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2118 (1995); *Furnco Construction Co. v. Waters*, 438 U.S. 567, 580 (1978). In the instant case, however, the district court's lengthy opinion contains specific factual findings which are dispositive under the *Miller* standard.

First, the district court concluded that neither race nor any other single consideration was the "predominant, overriding" factor behind the contours of Districts 1 and 12. Rather, it held,

> the . . . locations and . . . shapes of the two districts resulted from *a combination of factors* that influenced legislative choices: [1] the equal-population requirements . . .; [2] the need for effective African-American voting majorities; [3] the legislative intention to create one predominantly rural (First) and one predominantly urban (Twelfth) district . . .; [4] the intention to create two districts with distinctive and internally homogeneous commonalities of interest; [5] incumbent protection; and [6] the maintenance of technical territorial contiguity.

J.S. 109a (emphasis added). The court observed as well that the desire of the Democrat-controlled state legislature to favor Democrats played a decisive role both in the legislative process

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[15]Pope Br. 17 n.7 ("appellants have comfortably carried that burden in this case"), 17-18 (summarizing evidence relied upon by appellants); Shaw Br. 19-20 and n.16 (summarizing evidence relied upon by appellants).

and in determining the shape and location of the districts.[16] The lower court made detailed factual findings regarding how this "combination of factors", no one of them predominant over the others, had shaped the two districts in question. J.S. 97a-101a. In both instances, far from any single factor simply overriding, across the board, all other considerations, the interaction and balancing of the competing factors were "vastly complicated in detail." J.S. 97a.

Second, the district court found that most of the irregularities in the contours of the First and Twelfth Districts were the result, not of racial considerations, but of a desire to protect incumbents.[17] "Many oddities of shape resulted. A greater number can be laid most directly to incumbent protection."[18] In this respect incumbency protection, not race, was the factor that overrode any concern for compactness.[19] The district court also found that incumbency protection at times overrode efforts to include

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[16]J.S. 94a-96a (the "alternative [adopted] . . . favored . . . partisan Democratic interests . . . and . . . perfectly trumped the Republican-favored plan.")

[17]The critical role of incumbency protection in shaping Districts 1 and 12 is detailed, *inter alia*, at Tt. 106, 647-48, 1057; Ex. 200 at 617, 898; Ex 501, Report of Morgan Kousser, PhD., [hereinafter "Kousser Report"], at 70-71; Daughtry Dep. 14-15; Pope Dep. 103-111.

[18]J.S. 99a; see *id.* at 100a ("[o]ther examples of irregularities of shape driven largely by concerns for incumbent protection abound in the record"), 101a (use of double crossover to protect district of Republican incumbent.).

[19]The particular devices employed in this case were traditional North Carolina districting techniques. Double-crossovers and point contiguity had repeatedly been utilized by the state legislature prior to the enactment of Districts 1 and 12. Tt. 405, 414, 442-44; J.A. 543-45, 555; Cohen Dep. 72, 79-80.

adjacent minority neighborhoods in the two districts in question. For example,

> [t]hough the home precincts of both Congressman Valentine in Nash County in the existing Second District and of Congressman Lancaster in Goldsboro in the Third were heavily (45%) African-American and were geographically slated for ready inclusions in the First District, they were retained in their existing districts.

J.S. 99a.[20]

Third, the district court found that the legislature's desire to create distinctively rural and urban districts resulted in the exclusion of black areas from one or the other of those districts. Thus the black neighborhoods of Durham and Raleigh, originally included in the Coastal Plain district, were removed to

> accommodate an expressed desire of African-American legislators and citizens from the rural Coastal Plain area that the remedial district centered in that area should not include urban African-American populations . . . .

[20]See J.A. 369, 375. Similarly, black voters in Cabarrus County, although adjacent to the Twelfth District, were left in the district of incumbent Representative Hefner. J.A. 365-66; Watt Dep. 59-60. Majority black precincts in Forsyth County, which would naturally have been encompassed in the Twelfth District, were removed and placed in the Fifth District to help the Democratic incumbent, Steve Neal. J.A. 364-65, Tt. 367-72; Watt Dep. 60.

J.S. 96a.[21] Black representatives from the Coastal Plain themselves attached greater importance to creating a distinctively rural First District than to including in that district the large concentrations of black voters who lived in urban areas.[22] The district court concluded as well that the legislature's desire to make the First and Twelfth Districts, respectively, rural and urban, was "one of the very factors that indisputably contributed to their irregular shapes." J.S. 102a.[23]

Fourth, the district court held that the First and Twelfth Districts, as ultimately enacted, were

> not the most geographically compact majority-minority districts that could have been created were no factors other than equal population requirements and effective minority-race voting majorities taken into account.

[21]Removal of these areas meant that District 1 had a lower percentage of black population than the majority-black district in the state's first plan, Chapter 601. The black population dropped from 57.26% to 55.69%. *Compare* J.A. 545 *with id* at 551.

[22]In addition, rural black populations adjacent to District 12 were excluded from that district, and placed in majority-white districts, to maintain the urban character of the Twelfth. Tt. 352; Watt Dep. 59-60. Large portions of four rural counties near the Virginia border, (including Vance and Caswell counties, which are 45% and 40% black in population respectively, Ex. 578) had been included in District 12 in earlier proposals, but were removed to meet the 80% rural guideline. J.S. 100a.

[23]The record contains voluminous evidence detailing the desire expressed repeatedly *prior* to the framing of Districts 1 and 12 for the creation of distinctively rural and urban districts. J.A. 181, 182, 356-57, Ex. 200 at 76, 144, 191-92, 241, 287-88, 443-451, 454, 484, 493, 495-96, 504, 600, 603.

J.S. 108a-109a.[24]

That is, it was precisely because other race-neutral factors *were* taken into account, and not subordinated to racial considerations, that the districts were shaped in a particularly irregular manner.

These district court findings that race was only one of numerous considerations shaping the North Carolina plan doubtless rested as well on a singular fact that highlights a crucial distinction between this case and *Miller v. Johnson*. In the instant case, as in *Miller*, there was a proposal to create three majority black districts.[25] The three-district plan was introduced by the Republican members of the legislature, J.A. 249, 233, 269, 288-90, but was rejected on a party line vote by the Democratic majority. Stip. 92-94. The black Democratic legislators, subordinating racial concerns to an overriding interest in partisanship, voted against this plan to create a third majority-minority district. As a consequence, a majority of the black residents of North Carolina today are in majority-white districts outside of Districts 1 and 12.[26]

Plaintiffs, although insisting that race was the sole motivation behind the North Carolina redistricting plan, do not squarely take issue with any of these findings, let alone assert that the findings are clearly erroneous. Their current

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[24]See J.S. 102a (challenged districts "are not the two most geographically compact remedial districts that could have been drawn--if not other interests had been considered".) Republicans opposed the redistricting plan because, far from subordinating all other considerations to race, the plan was more irregular precisely because it furthered the non-racial purpose of protecting Democratic incumbents. J.A. 221, 226.

[25]Stip. Ex. 10, 95-100; Stip. 94.

[26]In the 1990 census, the black population of North Carolina was 1,456,323. (J.S. 82a). The combined black population of the First and Twelfth Districts is 629,081, or 43.2% of the state total. J.A. 551.

suggestion that race was the predominant purpose of the redistricting plan is flatly inconsistent with their contentions prior to this Court's decision in *Miller*. The Pope plaintiffs, for example, filed a separate action in 1992 alleging that the central purpose of the redistricting plan was not race, but political partisanship. *Pope v. Blue*, 809 F. Supp. 392 (W.D.N.C. 1992), *aff'd mem.* 113 S.Ct. 30 (1992). The Pope plaintiffs reiterated that contention in 1993 when they moved to intervene in the instant case.[27] Art Pope testified at the trial of this case that the location and shapes of the districts in Chapter 7 were due to "partisan gerrymandering." J.A. 525-533. In his deposition in this case, plaintiff Robinson Everett testified that Chapter 7 was "rammed down the throat of the legislature for the benefit of certain groups" including "a particular administration and perhaps a particular political party." R. Everett Dep. at 92. Plaintiffs' post-*Miller* bald assertions that race was the predominant motive behind the North Carolina redistricting plan are insufficient to overcome the District Court's express detailed findings to the contrary.

(c) Plaintiffs suggest that *Miller* contains no requirement that they establish that race was the predominant, overriding purpose of the challenged districts. The Shaw plaintiffs contend, for example, that "the reference in *Miller* to the 'predominant' and 'overriding' purpose of the Georgia legislature should not be viewed as *requiring* that a plaintiff satisfy [that standard]." Shaw Br. at 19, n.16. (emphasis added); *see* Pope Br. at 17, n.7. This contention is flatly inconsistent with the unequivocal language of *Miller* itself, which clearly specifies that "a plaintiff must *prove*" that the

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[27]The Pope plaintiffs alleged that "the General Assembly's goal was to protect or enhance the electoral possibilities of certain incumbents. In order to achieve this goal, the General Assembly concocted congressional districts with grossly contorted shapes with no logical explanation other than incumbency protection or enhancement of Democratic partisan interests." Complaint in Intervention at 11, (September 13, 1993).

legislature subordinated any non-racial considerations to a predominant racial purpose. 115 S.Ct. at 2488 (emphasis added).

To the extent that Miller imposed such a requirement, both appellants urge that *Miller* was wrongly decided. Shaw Br. at 19, n.16; Pope Br. 17, n.7. But plaintiffs offer no persuasive reason, indeed offer little argument at all, why this Court should overturn the *Miller* standard less than a year after that decision.

Miller properly stressed that the application of equal protection principles to redistricting is "a most delicate task," 115 S.Ct. at 2483, requiring a "circumspect approach." 115 S.Ct. at 2486. As the district court in *Miller* correctly recognized, strict scrutiny of *every* districting plan in which race played any role would inevitably extend to virtually every plan enacted in whole or in part to comply with Section 5 of the Voting Rights Act. *Johnson v. Miller*, 864 F. Supp 1354, 1373 (S.D.Ga. 1994). Similarly, since every plan passed in every city, county, and state with a significant non-white population had to comply with Section 2 of the Voting Rights Act, racial factors played some motivating role in those plans, and they would be subject to challenge. If this Court were to overturn *Miller* and apply strict scrutiny whenever any such racial purpose was present, such a standard would require court review of an overwhelming number of election districts.

The carefully framed standard in *Miller* serves, as Justice O'Connor observed, to avoid a construction of the Fourteenth Amendment which would quite literally discriminate against black voters. State legislators have long drawn district lines for the purpose of creating districts a majority of whose voters belong to a particular white ethnic or religious group. *Miller*, 115 S.Ct. at 2505 (Ginsburg, J., dissenting); *Mobile v. Bolden*, 446 U.S. 55, 88 (1980) (Stevens, J., concurring). During the 1993 *Shaw* argument, counsel for appellants urged this Court to establish for Polish or other

white ethnic districts a constitutional standard different and less stringent than that applicable to black districts.[28] But the Equal Protection Clause makes no such distinction, applying in the same manner to any "distinctions based on color and ancestry." *Hirabayashi v. United States*, 320 U.S. 81, 110 (1943). Indeed, the double standard earlier proposed by the Shaw appellants would be a racial one, because a deliberately created Polish, Irish or Italian district would necessarily, and every bit as deliberately, be a majority- white district. It is inconceivable that the Equal Protection Clause establishes a greater barrier to the deliberate creation of a black district than it does to the deliberate creation of an Italian or other white ethnic district. "[T]he driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks", not a scheme to constitutionalize it.[29] *Miller*, 115 S.Ct. at 2497 (O'Connor, J., concurring). The *Miller* standard avoids the creation of a double standard by expressly applying to all ethnic groups. 115 S.Ct. at 2497 (O'Connor, J., concurring). At the same time, by extending strict scrutiny only to those extreme cases in which all other factors are subordinated to race or ethnicity, *Miller* avoids sweeping into federal court the countless more

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[28] *See Shaw v. Reno*, No. 92-357, 1993 WL 751836 at 54-55.

[29] Automatic application of strict scrutiny to every instance of deliberate race-based districting would also result in a constitutional double-standard to the extent that favoring white incumbents is constitutional, but favoring black incumbents, where they receive a high level of support from black voters, would be subject to strict scrutiny. The Shaw plaintiffs, while voicing no constitutional objection to incumbency protection, argue that a plan drawn to assist a specific candidate who is black necessarily violates the Equal Protection Clause. *Compare* Shaw Br. at p. 15, n.14. *with* R. Everett Dep. at 95-96 (expressing the view that protecting incumbents is constitutional "if you take the race out of it" and only protect white incumbents).

mundane instances in which race or ethnicity was only one of several factors that combined to shape a particular district.

III. NORTH CAROLINA'S REDISTRICTING PLAN IS JUSTIFIED BY A COMPELLING STATE INTEREST IN COMPLYING WITH SECTION 2 OF THE VOTING RIGHTS ACT

Even if the strict scrutiny standard were to be applied, the court below was correct in upholding Chapter 7 against plaintiffs' constitutional challenge, because the state had a compelling interest in complying with the Voting Rights Act and in remedying the effects of current and past discrimination in voting and elections (as we show below)[30] and because the 1991 plan was narrowly tailored to further that interest (see § VI *infra*).

The court below found that the General Assembly enacted Chapter 7, among other reasons, in order to comply with Section 2 of the Voting Rights Act. J.S. 90a, 108a. That finding is not clearly erroneous[31] but rather is supported by overwhelming evidence on this record demonstrating (a) that the *Gingles* prerequisites for a Section 2 claim existed in North Carolina at the time of the 1991 redistricting; (b) that the "totality of the circumstances" strongly supported the conclusion that a plan that created fewer than two Congressional districts within which African-American voters could elect candidates of their choice would violate Section 2;

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[30]The *Gingles* defendants adopt the argument of the State (at pages 37-38 of the State Appellees' Brief) that the court below correctly interpreted and applied the burden of proof at the strict scrutiny stage of equal protection analysis.

[31]Deference must be given to the trial court's findings of fact so long as there is evidence to support them. *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1984). *See also Rogers v. Lodge*, 458 U.S. 613, 622-23 (1982) (clearly erroneous standard applies to ultimate facts and the subsidiary findings upon which they are based).

and (c) that the North Carolina General Assembly was aware of and actually considered these factors in 1991.

A fortiori, the General Assembly had "a strong basis in evidence" for concluding that an apportionment plan with less than two such districts would succumb to a Section 2 challenge. *See Miller*, 115 S. Ct. at 2491, *citing City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500-01 (1989) and *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276-77 (1986) (plurality opinion); *Voinovich v. Quilter*, 113 S.Ct. at 1156 (state is not required to make contemporaneous findings of actual discrimination or of a Section 2 violation before enacting redistricting plan that remedies vote dilution).[32]

(a) Each of the three *Gingles* factors necessary to demonstrate vote dilution are met with regard to North Carolina's congressional districts. In *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994), and *Growe v. Emison*, 113 S.Ct. 1075 (1993), this Court confirmed that the "three now-familiar *Gingles* factors" are the preconditions for demonstrating that a single-member district plan dilutes the voting strength of black voters

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[32]The plaintiff-intervenors rely exclusively on a memorandum submitted by the state to the Justice Department during the preclearance process to support their assertion that, in fact, the General Assembly did not believe that Section 2 of the Voting Rights Act required the creation of two majority-black districts in North Carolina. Pope Br. at pp.31-34 The court below was correct to conclude that the fact that the state initially defended Chapter 601 in seeking its preclearance, does not mean that it did not have a substantial basis in fact for later concluding that Chapter 601 would likely violate the Voting Rights Act. J.S. 112a. If the candidates of choice of the black community were being elected to Congress in numbers roughly proportional to their share of the state's voting-age population as a whole, that may be evidence that the state was not in fact motivated by a desire to comply with Section 2 of the Voting Rights Act. *See Johnson v. DeGrandy*, 114 S.Ct. 2647, 2661 (1994). However, the fact that the state first vigorously defended its initial -- and inadequate -- redistricting plan does not preclude it from later determining that the plan probably did violate the Voting Rights Act.

in violation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973(b). *DeGrandy*, 114 S.Ct. at 2657. *Gingles*, 478 U.S. at 46-47. The court below found that each of those preconditions is present with respect to North Carolina's congressional districts.

(1). White bloc voting. The court below found that the pervasive and persistent refusal of white voters in North Carolina to vote for black candidates has consistently operated to deny black voters an equal opportunity to elect candidates of their choice. J.S. 93a. This finding was supported by factual analysis of both congressional[33] and other statewide elections in North Carolina.[34] As the state's expert witness concluded, "[t]he polarized voting found in *Thornburg v. Gingles* is not a phenomenon of the past; it remains prevalent in the state today." J.A. 597.

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[33]None of the black candidates who ran for Congress in North Carolina in four elections during the 1980's obtained enough white votes to win a primary election, even if they had overwhelming support among African Americans. See J.A. 580-81 (report of Dr. Richard Engstrom) ("[C]ongressional elections in North Carolina have been marked by a persistent pattern of racially polarized voting").

[34]A study of 50 recent elections in which voters have been presented with a choice between African-American and white candidates, including elections for the U.S. House of Representatives, statewide elections to high profile and low profile offices, and state legislative elections in both single-member and multi-member districts, found that 49 of them were characterized by racially polarized voting. J.A. 596. Indeed, *every* statewide election since 1988 where voters were presented with a biracial field of candidates has been marked by racially polarized voting. In all except two low-profile contests, racially polarized voting was sufficient to defeat the candidate chosen by black voters. J.A. 581-585. Of every biracial state legislative district election since 1988, only one was not marked by racially polarized voting. The one exception was a 1992 multi-seat election in which African-American candidate Mickey Michaux received more white votes than two white challengers from the Libertarian Party. J.A. 585-91.

(2). Political cohesion of black voters. The court below held that it was undisputed that the African-American population is politically cohesive, J.S. 93a. In addition to the evidence that black voters overwhelmingly support the same candidates, J.A. 575, this finding is supported by evidence about the similarity of political opinions among blacks in North Carolina, J.A. 604-605, and testimony of witnesses about the shared experiences that provide the substantive basis for this considerable unity in political views. J.A. 643-659; Ex. 502, Statements of Albright, Harris, Michaux, Leeper, Ballance, Newell, Sears, D. Blanks, and Smallwood.

(3). Size and compactness of the black population. The court below held that:

> The overwhelming evidence established that the state's African-American population was sufficiently large and geographically compact to constitute a majority in two congressional districts; numerous examples of plans drawing two majority-minority districts were presented to the court, including several prepared by the Plaintiff-Intervenors in which the majority-minority districts themselves were "geographically compact" under any reading of *Gingles*.

J.S. 93a (record citations omitted). This conclusion follows from the subsidiary finding that in North Carolina there are "major, discrete concentrations of African-American population . . . the most significant ones of which, reflecting historical forces dating from slavery, are in the Coastal Plain and the Piedmont," J.S. 83a,[35] and the fact that it is actually

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[35]*See also* Keech & Sistrom, *North Carolina*, in Quiet Revolution in the South 156 (C. Davidson & B. Grofman eds., 1994) [hereinafter "Keech & Sistrom"] (North Carolina's black population is concentrated in the historical black belt in the eastern section of the state and in the urban areas of the Piedmont).

possible to draw *three* majority-minority congressional districts in North Carolina, one such plan having been introduced during the legislative process, *see* J.A. at 289-90.

The plaintiffs, however (Shaw Br. at 28-30), ask this Court to disregard the findings below, citing only a newspaper article and asserting that one of the remedial district proposals made *by plaintiff-intervenors* involved a "plurality-black" district that would be insufficient to meet the *Gingles* threshold requirement, rather than a majority-black district. In fact, evidence presented at trial demonstrated that the Charlotte to Robeson County district in the "Shaw II" plan (District 3), although it would have disregarded state policy by combining urban and rural populations with very different interests and needs, *see* J.A. 287, 381, Tt. 828-29, 945-46, arguably would give the African-American voters in the district the opportunity to elect candidates of their choice.[36]

Appellants' arguments[37] that the black population was not sufficiently "compact" to meet the Section 2 prerequisite also fail because the *Gingles* compactness requirement, 478 U.S. at 50, relates to the dispersion of the minority community rather than to the shape of a remedial district. The precondition inquires whether the minority population is sufficiently compact geographically to be included within a district; it is not a requirement that such a district be of any particular shape or regularity.

Thus, for example, if there were complete residential integration within a state, then the minority community would not be geographically compact and it would simply be

[36]The evidence indicated that candidates supported by the African-American community in Robeson County were on occasion able to attract sufficient Native-American crossover votes to secure election. See J.A. 596.

[37]Shaw Br. at 28-30; Pope Br. at 36-38.

impossible to draw a district in which the minority voters were in the majority. *See Gingles*, 478 U.S. at 50 n.17. On the other hand, if there are residential concentrations of African-American voters in sufficient numbers to be included within a district, the district does not have to be geographically regular but need only allow for effective representation. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D.Ala. 1988). *See also Neal v. Coleburn*, 689 F. Supp. 1426 (E.D.Va. 1988); *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D.Ark. 1989).[38]

Thus, the findings of fact of the court below establish that each of the *Gingles* preconditions is met in North Carolina. Once those preconditions are satisfied, the vote dilution analysis requires an examination of the totality of circumstances to determine whether or not black voters have an equal opportunity to participate in the political process and elect candidates of their choice. 42 U.S.C. § 1973(b); *Johnson v. Degrandy*, 114 S.Ct. at 2647; *Gingles*, 478 U.S. at 43.

[38] In this respect, the use of the term "compact" in the first *Gingles* prong differs from its use in *Shaw v. Reno*. There, compactness is used in the sense of geographic regularity. Irregular districts, under *Shaw*, can provide evidence of an equal protection violation. This also explains why, during the preclearance process, the Justice Department may have stated that the shape of the districts does not matter. Not only is compactness not constitutionally required, it is neither a federal statutory requirement in the redistricting process, see 2 U.S.C. § 2(c), nor a State constitutional or statutory requirement. Stip. 20. Although from 1901 to 1922 federal law imposed a compactness requirement on congressional districts, since 1929 Congress decisively has rejected repeated efforts to reimpose compactness requirements on the reapportionment process. *See Wood v. Broom*, 287 U.S. 1, 7 (1932). Unsuccessful bills which would impose a compactness requirement have regularly been introduced. *See, e.g.*, H.R. 2648, 82nd Cong., 1st sess. (1951); H.R. 970, 89th Cong., 1st sess. (1965); H.R. 2508, 90th Cong., 1st sess. (1967). The Justice Department would have no authority to require a state to draw compact congressional districts.

(b) An analysis of the totality of circumstances shows a Section 2 violation. Here we highlight only the most salient evidence that supports the conclusion that a congressional districting plan such as that embodied in Chapter 601 would have violated Section 2.

(1). Political campaigns in North Carolina have continued to involve intentionally discriminatory tactics and racial appeals. North Carolina elections since this Court's ruling in *Gingles* have often involved campaign tactics deliberately and demonstrably designed to keep African-Americans from voting. Most significantly, in 1990, just days before the general election in which black candidate and former Charlotte Mayor Harvey Gantt opposed U.S. Senator Jesse Helms' reelection, black voter turnout was reduced by a misleading and intimidating postcard mailing.[39]

Racially polarized white bloc voting against African-American candidates is exacerbated by explicit or subtle racial appeals during political campaigns. The most notorious recent examples of racial appeals in North Carolina campaigns also

[39]Post cards entitled "Voter Registration Bulletin" were mailed to 125,000 African-American voters throughout the state. The "Bulletin" suggested, incorrectly, that individuals could not cast ballots if they had moved after registering but less than 30 days before the election, and suggested that attempts to do so might result in criminal prosecution. See J.S. 93a-94a, n. 57; J.A. 673-74; Ex. 526, Consent Order in *United States v. North Carolina Republican Party*, No. 91-161-CIV-5F (E.D.N.C. February 27, 1992); Tt. 1011. The postcards were sent to black people who had lived at the same address for years, Ex. 502, Statements of Foxx, Harris, & Simpkins, and caused widespread confusion among black voters about whether or not they could vote. *Id.* Statements of Burts, Johnson, Emerson, Watt; J.A. 495-96.

come from the Gantt-Helms contest in 1990. J.S. 93a.[40] However, there are other examples of explicit racial appeals in political messages of the early 1990's at the state and local levels. J.S. 93a; J.A. 612-20; Ex. 505; Tt 1011. The overall effect of such racial appeals "has been to diminish seriously the opportunities of black citizens for an equal exercise of their political rights." J.A. 621.[41]

(2). The continuing effects of past discrimination keep black voters from participating effectively in the political process. Current forms of racial discrimination in matters affecting voting are all the more effective because of the long history of official and purposeful discrimination which ended in some areas of the state less than twenty years ago. The initial demise of black political participation following Reconstruction as a result of the "White Supremacy Campaign" of 1898 and North Carolina's adoption of literacy tests and poll taxes is described in the Brief of the Congressional Black Caucus as *Amicus Curiae* in Support of Appellees. Only 15% of the state's blacks were registered to

[40]Television ads which distorted Harvey Gantt's picture and voice, and others which were specifically designed to encourage racial stereotypes and fears "had a dramatic impact on the 5% to 6% of the electorate which the polls indicated had been 'undecided'." Ex. 502, Statement of Melvin Watt. *See also* J.A. 619. After the ads ran, polls showed that virtually all of the undecided voters voted for Jessie Helms. *Id.*

[41] Specific polls conducted in the 1990 election report substantial numbers of white North Carolinians who said they would simply not vote for a black candidate. Ex. 501, Report of Alex Willingham, Ph.D. at 20. A focus group study of the ads in the Gantt-Helms campaign showed how this series of ads effectively primed voters to react with negative racial characterizations. *Id.* at 22.

vote in 1948, and only 36% in 1962. Kousser Report at 30.[42]

As black voter registration increased,[43] other official forms of discrimination were enacted, including numbered seat requirements, anti-single shot provisions, and at-large and multi-member districts. *See Gingles v. Edmisten*, 590 F. Supp 345, 359-64 (E.D.N.C. 1984); Krech & Sistrom, at 162. North Carolina did not elect a black state legislator until 1968, and it refused at that time to abolish multimember districts for the state legislature. In 1967 the North Carolina General Assembly passed a numbered seat system, subsequently declared unconstitutional because it denied equal protection to black voters.[44] *See Dunston v. Scott*, 336 F. Supp 206

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[42]After passage of the Voting Rights Act, the percentage of eligible blacks registered to vote passed 50% for the first time since 1900. Kousser Report at 30. However, use of the literacy test continued until the early 1970's and is still a vivid memory for many older black voters, Ex. 502, Statements of J. Sears, O. Blanks, A. Ballance, some of whom still express the belief that they cannot register if they are unable to read or write. See Ex. 502 Statement of J. Burts, special registrar in Charlotte, N.C.

[43]In 1970, 52.2% of the black voting age population was registered to vote. In 1980, only 51.3% of age-qualified blacks were registered, whereas that same year 70.1% of the age-qualified whites were registered. J.A. 300. By 1993, the gap between white and black registration rates statewide had closed to slightly over ten percent, with 61.3% of the black voting age population registered, and 72.5% of the white voting age population registered. J.A. 300.

[44]The same legislature that adopted the multimember districts and numbered seat system also refused to add Durham County to the Second Congressional District because it would allow too great a black voter influence in that district. See discussion *infra* at pp. 41-42; Kousser Report at 31, 34-46; J.A. at 621-22.

(E.D.N.C. 1972). Multimember state legislative seats in areas where they diluted the votes of black voters were not eliminated until after this Court's decision in *Thornburg v. Gingles*.

(3). Black candidates have not been elected to public office to any significant extent. At the time the North Carolina General Assembly was considering the plan at issue here, "African-Americans were still not being elected to political office in the state in numbers even remotely approaching their representation in the general population, despite the fact that capable and experienced African-American candidates were running for election." J.S. at 92a. No candidate who was the choice of the black community had ever won election to a statewide non-judicial office since 1900. D.I. Stip. 79. No African-American had been elected to Congress from North Carolina during the same period. J.S. 115a. Although some candidates of choice of the state's African-American voters had been elected to public office from single-member districts where black voters were in the majority, the relative percentages of black elected officials in North Carolina in the early 1990's had actually not increased over those present in 1984 when the district court in *Gingles* considered this factor as relevant to the totality of circumstances inquiry in a vote dilution claim.[45]

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[45]*Compare Gingles v. Edmisten*, 590 F. Supp. at 365 (Blacks hold 9% of city council seats, 7.3% of county commission seats; 4% of sheriff's offices, 9.2% of the state House; 4% of the state Senate) *with* D. I. Stips. 76-80 (in 1989 Blacks held 8.1% of all elected offices; 8.8% of the state legislative seats; 6.9% of county commission seats; 4% of sheriff's offices). *See also*, 42 U.S.C. § 1973(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered").

(4). Black voters in North Carolina bear the effects of past discrimination in education, employment and health which hinder their ability to participate effectively in the political process. Equal political participation of African-American voters in North Carolina is further impeded by the fact that they continue to suffer from a disproportionately low position on virtually every measure of socio-economic status. J.S. 92a. There is a significant history of official discrimination in education, housing, employment and health services in the state, documented in *Gingles*, 590 F. Supp. at 361, 478 U.S. at 64, which has resulted in blacks as a group having less access to transportation and health care and in their being less well-educated, lower-paid, and more likely to be in poverty and to

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In the state House of Representatives, which has 120 members, the number of African-American legislators grew from three in 1981 to fourteen at the time of redistricting in 1991. J.A. 44. After the 1992 redistricting, eighteen blacks served in the House, seventeen of whom were elected from single-member majority black districts. One was elected from a multi-member majority white district which allows for single-shot voting. J.A. 45. On the Senate side, with fifty members, one African-American was serving at the time of the 1981 redistricting, and five were serving in 1991. J.A. 43. After the 1992 redistricting plans were enacted, seven blacks were elected to the Senate, five of whom won in majority-black single-member districts, and two of whom won in multi-member majority-white districts. Three majority-black single-member districts elected white representatives, two in the Senate and one in the House. J.S. 60a, n. 40; Stip. Ex. 34 at 25. **No single-member majority-white district elected a black candidate to the state legislature.**

At the local level, in 1989, of 529 county commissioners throughout the state, 36 were black. J.A. 299. Most of the African-Americans holding local offices were elected as a result of lawsuits or negotiated settlements changing the method of election from an at-large system to single member districts. Keech & Sistrom, at 171-72 & 178-79.

live in substandard housing than their white counterparts. J.A. 294-98, 645-46, 651-55.[46]

These disparities make it more difficult for black citizens to register, vote, and elect candidates of their choice.[47] At the same time, they create interests common to many African-Americans in the state on social and economic issues which are not shared by many white citizens who lack the experience of longstanding official racial discrimination.[48]

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[46]For example, in 1989, 27.1% of African-Americans in North Carolina had incomes below the poverty level, while 8.6% of whites did. The average per capita income for whites was nearly twice that of blacks. Roughly three-quarters of the state's whites were high school graduates, while slightly over half the state's blacks had a high school education. Nearly a quarter of black households had no car available, while only six percent of white households were carless. Fifteen percent of black households had no phone, while only four percent of white households were without a telephone. J.A. 294-97. Lacking financial resources, transportation and easy communication makes supporting an effective political campaign much more difficult. Willingham Report at 30-35.

[47]For example, black citizens who are illiterate or semi-literate have been intimidated by the voting process because of their limited abilities. Ex. 502, Statements of Sears, Ballance, Williams. Many low-wage and hourly workers have limited access to transportation and cannot afford, or are not given, the time off to vote. Ex. 502, Statements of Michaux, Sears, Ballance, and Williams. Black citizens are hindered in their ability to field candidates and to participate effectively in the political process by their lower financial status, lower educational attainment, lack of employment security and lack of physical resources. Tt. 855 Willingham Report at 30-33; Ex. 502, Statement of Blanks.

[48]Many of these issues, such as housing, access to credit, education of economically disadvantaged youth, unemployment, community economic development, neighborhood redevelopment, the unique concerns of historically black colleges and universities, discrimination in housing and employment, and civil rights, J.A. 643-659; Ex. 502 (Statements of R. Albright, J. C. Harris, E. Davis, E. L. Allison, and O.

(c) The court below found that the General Assembly was specifically aware "that conditions in North Carolina were such that the African-American minority could very likely make out a *prima facie* § 2 challenge to the Chapter 601 plan or, for that matter, to any other Plan that did not contain two majority-minority districts." J.S. 91a. Although appellants contend[49] that compliance with Section 2 was a "post-hoc rationalization" for the plan that was not a concern of the legislature at the time of redistricting, it is difficult to imagine more direct evidence of the legislature's concern about compliance with Section 2 of the Voting Rights Act than the statements of legislators made in floor debates prior to passage of Chapter 7.[50] Again and again legislators debated the proper interpretation of Voting Rights Act, what it requires,

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Blanks), are addressed at the federal level, including by congressional representatives.

[49]Shaw Br. at 27-28; Pope Br. at 29-35. In addition, plaintiffs erroneously assert that the state's compelling interest in complying with §2 of the Voting Rights Act is "newly perceived." Shaw Br. at 27. In fact, that very argument was made by the state in its brief on the merits the first time this case was before this Court. *See*, State Appellees Brief, No. 92-357, at 45-46 (February 24, 1993).

[50]References were made to Section 2 of the Voting Rights Act, Gingles, or vote dilution 51 times in the complete legislative history. *See*, Stip. Ex. 200 at 32, 170, 225, 226, 227, 309, 502, 509, 518, 894 (Section 2); 75, 228, 341, 348, 509, 784, 787, 822, 827, 922, 923, 953, 957, 963, 1239 (*Gingles*); 33, 76, 78, 91, 200, 210, 271, 385, 418, 419, 434, 436, 506, 509, 617, 619, 776, 818, 919, 1041, 1184, 1193, 1207, 1258, 1259, 1286 (dilution of minority voting strength).

and what would be best for all of North Carolina's citizens. *See, e.g.*, J.A. 207, 223, 226.[51]

Members of the 1991 North Carolina General Assembly had lived through, and been active participants in, the history of electoral politics discussed above. Well over half had been in the General Assembly in 1986 when they were required by the *Gingles* litigation to create eight majority-minority districts; and fifty-eight had been members of the 1981 General Assembly which elected to redraw the congressional redistricting plan following the Justice Department's refusal to preclear the first plan. J.S. 90a. They were intimately familiar with the history of discriminatory electoral and other official policies in the state. *See, e.g.* Stip. Ex. 200, at 1268; J.A. 207, 209-10, 212, 237. Speakers at the fifteen local public hearings on redistricting conducted by the

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[51]Both those in favor of Chapter 7 and those opposed to it gave their interpretations of what the Voting Rights Act might require. For example, Senator Winner offered the opinion that "[w]hat the Voting Rights Act says is when you have a big enough concentration of blacks, or any minority, to form a majority that you may not deprive that group of a majority by fracturing them into different districts or by submerging them into multi-member districts." J.A. 200. Senator Hunt, speaking in favor of Chapter 7, referred to the history of segregated schools, the politics of exclusion in the past, and the lack of involvement of blacks on the staff of the Second District Congressman, and argued that "[i]n providing an opportunity for black people to participate in the process, a process which has and will have a major impact upon the lives, upon the life styles, upon the quality of life that black people will enjoy but cannot be anything but right and well doing in such a process." J.A. 214. Senator Ballance specifically mentioned the *Gingles* litigation and his view that the decision does not require guaranteed seats for black Americans but does require an opportunity. J.A. 217. Senator Simpson said he had not read the *Gingles* decision, but he believed that what should be done was to create two compact black districts without regard to incumbency protection. J.A. 220-22.

redistricting committees of the General Assembly in the spring of 1991 also discussed their own experiences of discrimination and the requirements of the Voting Rights Act.[52]

For all of these reasons, on this record there is no basis whatsoever for overturning the finding below that the North Carolina General Assembly had a strong basis in evidence for concluding that the failure to draw two majority-minority congressional districts would violate Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (b). J.S. 91a-93a, 111a.

IV. NORTH CAROLINA HAD A COMPELLING STATE INTEREST IN COMPLYING WITH SECTION 5 OF THE VOTING RIGHTS ACT BECAUSE THE JUSTICE DEPARTMENT CORRECTLY APPLIED SECTION 5

The North Carolina General Assembly did not fall victim to a desire to maximize the number of majority-black congressional districts, or to give black citizens proportional representation. Representative Flaherty introduced a congressional redistricting plan which he argued gave minority voters an opportunity to elect candidates of their choice in three congressional districts. J.A. 249. Stip. Ex. 10, 95-

[52]The legislators were cautioned by several people, including special counsel to the Republican Party, Robert Hunter, who represented plaintiff-intervenors in the *Gingles* litigation, *see, Gingles v. Edmisten*, 590 F. Supp. 345, 349 (E.D.N.C. 1984), that the failure to draw two majority black districts would result in litigation. J.S. 91a-92a. In fact, at one public hearing Mr. Hunter explicitly expressed the opinion that proposed plans fractured the black population and violated Section 2 of the Voting Rights Act. Stip. Ex. 200 at 518.

106.[53] The three districts had a majority of minority registered voters.[54] He argued on behalf of it on the floor of the House on two occasions, saying that it was more compact, that he did not ask the staff to look at partisan issues when drawing this plan, and that it was the only plan he had seen where North Carolina could have three black congressmen. J.A. 269, J.A. 288-90. The Flaherty plan was introduced in the Senate by Senator Leo Daughtry.[55] Stip. 94. Flaherty's plan was rejected along partisan lines in both the House and the Senate. Stip. 92-94.

The court below found that the State of North Carolina had a strong basis in fact for believing that its failure to create two majority-black districts was a violation of the "purpose" prong of Section 5 of the Voting Rights Act. J.S. 111a-112a. Unlike the Justice Department's objection in Georgia, which was based on the failure to create as many majority black districts as possible, the Department's objection in North Carolina was based on the state's decision to favor incumbents rather than create a second majority-black district. *Compare Miller*, 115 S.Ct. at 2492 *with* J.A. 152-53. Had the

[53]Lodged with the court as map 1.Q in Notebook of Relevant Maps Lodged by Parties.

[54]The state population is 22% black. J.A. 64. If black voters had an equal opportunity to elect candidates of their choice in three of the state's twelve congressional districts, they would elect 25% of the congressional delegation. With a majority in two districts they elect 16% of the delegation. Thus, Flaherty's plan would have come closer to adequate representation as described in *DeGrandy*, 114 S.Ct. at 2661.

[55]*See also* J.A. 233 (Senator Lee expressing sentiment during Senate debate that the Justice Department might come back and require three majority-black districts).

Justice Department been following a maximization policy in North Carolina, it would have indicated that the state should adopt some version of Representative Flaherty's three majority-minority district plan. The court below found that the General Assembly had conducted its own independent reassessment of Chapter 601 after considering the concerns identified by the Justice Department, and reasonably concluded that the Justice Department's conclusion was legally and factually supportable.[56] J.S. 112a. Having so concluded, the state did not simply endorse the Justice Department's suggestion about where a second majority black district might be drawn, but rather took into account all of the other state interests important to this General Assembly, and finally enacted a plan which met a variety of goals.

V. CHAPTER 7 IS JUSTIFIED BY A COMPELLING STATE INTEREST IN REMEDYING CURRENT AND PAST DISCRIMINATION

In addition to compliance with the Voting Rights Act, the General Assembly has a compelling interest in remedying racially polarized voting, and the effects of both recent and historical discrimination against black voters. J.S. 55a-57a. *See, Shaw,* 113 S.Ct. at 2831-32 (citing *Croson,* 488 U.S. at 491-493, 518; *Wygant,* 476 U.S. at 280-82, 286). Although the

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[56]There was support for the state's belief that a court might find its first plan to have violated the "purpose" prong of Section 5. Other courts have recognized that intentional discrimination against minority voters may be masked by an asserted interest in protecting incumbents. *Garza v. County of Los Angeles,* 918 F.2d 763, 771, 778-79 (9th Cir. 1990) *cert. denied,* 498 U.S. 1028 (1991); *Ketchum v. Byrne,* 740 F.2d 1398, 1408 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago v. Ketchum,* 471 U.S. 1135 (1985); *Rybicki v. State Bd. of Elections,* 574 F. Supp. 1082, 1109 (N.C. Ill. 1982) (three-judge court).

court below found that such motivation alone probably would not have led to the passage of Chapter 7, J.S. 108a, this was certainly the goal of some legislators, J.S. 89a.

(a) There was substantial evidence in the record of racial discrimination in congressional redistricting prior to 1990. Most recently, "legislators took special pains in 1965-66 and 1981-82 to dilute black voting strength in order to diminish the political leverage of black voters and the political prospects of potential black candidates."[57] J.A. 621. In both instances, the issue was where to place the large and politically active black population in Durham County so that black voters would not have too much influence in the district. J.A. 621-23; Kousser Report at 34-53.

In 1965 the solution to the "problem" was to place Durham County in the Fifth District rather than create a district in the Triangle (Raleigh-Durham-Chapel Hill) that might have elected a congressman responsive to black political interests. J.A. 622. In 1981, the solution passed by the legislature was "Fountain's Fishhook", a strangely shaped district that curved around Durham to exclude it from L. H. Fountain's Second District. The Justice Department denied that plan preclearance on the grounds that the plan had the purpose and effect of diluting minority voting strength. J.S.

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[57] The history of discrimination against African-Americans in congressional redistricting in North Carolina goes back to 1872, when the state legislature intentionally packed black voters into the "Black Second". Kousser Report at 28. The Black Second effectively confined black voters' control, in a state that was approximately one-third African-American, to a maximum of one district in nine. *Id.* at 29. The shape of the Black Second was described by Republican Governor Todd Caldwell as "extraordinary, inconvenient and most grotesque." E. Anderson, *Race and Politics in North Carolina, 1872-1901: The Black Second* 3 (1981).

90a & n.55; Stip. Ex. 195; Kousser Report at 42. Following the Justice Department's objection, and in the face of a legal challenge on vote dilution grounds, the legislature redrew the plan to include Durham in the Second District, and simultaneously to shift other black populations, notably Northampton County, one of the state's majority-black counties, out of the Second. Kousser Report at 41-44, Ex 501, Report of James O'Reilly, Ph.D. at 5. The Justice Department precleared the second plan because it was approximately 40% black in total population. Kousser Report at 45, Ex. 502, Statement of Mickey Michaux at 4.

As a result of this new Second District, great hope was generated that African-Americans finally had an opportunity to elect a candidate of their choice.[58] Campaigns were mounted by Mickey Michaux and Kenneth Spaulding in the Second Congressional District, in 1982 and 1984 respectively. "Both the Michaux and Spaulding campaigns were serious, strong, well-financed efforts of experienced, well-known candidates with broad support across the District." O'Reilly Report at 5. Despite employing careful and well considered strategies to appeal to voters of both races, neither candidate was able to obtain the Democratic Party nomination because of racially polarized voting and the use of racial appeals in the

[58]There had been two earlier unsuccessful campaigns by African-American candidates for Congress. In 1968, Eva Clayton was the first African-American to run for Congress since 1898. When she began her campaign, blacks constituted only 11% of the registered voters, though they comprised 40% of the Second District's population. Kousser Report at 31. In 1972, after Orange County was added to the Second District, Howard Lee announced his bid for the Democratic Party's nomination. His defeat in the primary was generally believed to be a result of bloc voting along racial lines. Kousser Report at 32-33.

campaigns. J.A. 580-81, 623; O'Reilly Report at 6. Subsequently, potential African-American candidates logically concluded that the expenditure of effort, time and money to run a congressional campaign was not feasible in the light of continued racially polarized voting and the strong perception that they could not win. Ex. 502, Statement of Kenneth Spaulding at 5.

(b) Past redistricting efforts fragmented a compact black population among two or more congressional districts. It is also demonstrably true in North Carolina that the representatives elected in such districts did not serve the interests of their African-American constituents, even when they constituted a sizeable minority. Perhaps the most blatant example of this is the fact that L. H. Fountain, a conservative white Democrat, opposed important civil rights litigation despite having a large black population in his district. J.A. 622.[59]

This anecdotal evidence is supported by the findings of Dr. Kousser's study of congressional roll call behavior which shows that today there is a difference in the effectiveness of

[59]There are other examples in the record. Prior to the enactment of Chapter 7, North Carolina's congressmen demonstrated a lack of responsiveness to the particularized needs of their black constituents. In Guilford County, African-American organizations regularly contacted their white congressman concerning civil rights measures and famine aid to Africa, with little success. Ex. 502, Statement of G. Simpkins. The recent past President of Johnson C. Smith University, an historically black institution in Charlotte, found little support for educational and community development efforts from his white previous congressman, even though the congressman served on the University's Board of Visitors. Ex. 502, Statement of R. Albright. Black residents in many parts of the state found their pre-Chapter 7 congressmen unresponsive to the particularized needs of their black constituents. Ex. 502, Statements of Davis, Ballance, Williams, Allison, Davis.

representation of African-American interests by those elected by African-American voters as compared with those elected from districts in which African American voters are not in the majority.[60] Kousser Report at 20-23.

Given the history of discrimination in North Carolina, the continuing disparities in voter registration rates and opportunities for political participation, the nearly one hundred years of an all-white congressional delegation, and the studies demonstrating that a candidate of choice of black voters has a significantly different voting record than a candidate elected from a district where African-Americans are a substantial minority, the North Carolina General Assembly had a strong basis for concluding that remedial action was necessary. The fact that not enough legislators were motivated by the goal of remedying past discrimination absent the Voting Rights Act does not invalidate the state's compelling interest in this goal.

VI. CHAPTER 7 IS NARROWLY TAILORED

(a) The court below applied standards adopted in the context of other race-based remedial measures to determine how a redistricting plan that justifiably takes race, among other factors, into account should be narrowly tailored to serve the state's compelling interest. J.S. 57a-76a. Under the five basic factors set forth in *United States v. Paradise*, 480 U.S. 149, 171-85 (1987), and developed in earlier opinions of

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[60]The data reported by Dr. Kousser indicate that before 1993, even in the most heavily African-American plurality districts, voting patterns of North Carolina congressmembers on roll call voting indices demonstrate diminished responsiveness to African- American concerns. The numbers show, for example, that throughout the 1970's and 80's, congressmembers elected from heavily African-American districts 1 and 2 consistently scored between 60% and 80% on conservative voting indices. In contrast, Representatives Watt and Clayton score 11% on these indices. J.A. 602-609.

this Court examining affirmative action programs, the plan is narrowly tailored. J.S. 113a.

First, the plan uses racial classifications minimally because it does not create more majority-minority districts than reasonably necessary to give black voters an equal opportunity to elect candidates of their choice to Congress, and the percentages of African-Americans in each district (50.5% in the 1st and 53.5% in the 12th) are no greater than is reasonably necessary.[61] The state's belief that majority-minority districts were necessary was well-founded. After the 1980's redistricting, hopes that the 40% black Second District would allow for the election of the black voters' candidate of choice were deflated by the experience in the Michaux and Spaulding campaigns, which demonstrated that white bloc voting was still sufficient to defeat the black candidate. The General Assembly knew from past experience that a measure using racial classifications to a lesser extent would not be effective in remedying the problem.

Second, the plan employs a flexible goal rather than a rigid quota. There is no guarantee that the black voters' candidate of choice will be elected in a majority-black district. For example, three white members of the North Carolina General Assembly were elected from majority-minority districts created by the *Gingles* litigation. J.S. 60a.

Third, the redistricting plan is a temporary remedy which can be redrawn after the next census. Section 5 of the

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[61]*Cf. United Jewish Organizations v. Carey*, 430 U.S. 144, 164 (1977) (it was reasonable for the Attorney General to conclude that 65% minority necessary); *Ketchum v. Byrne*, 740 F.2d at 1413-1417 (extensive discussion of precedents establishing that 65% super-majority needed to give black voters equal opportunity to elect candidates of their choice).

Voting Rights Act will not necessarily lock in the two majority-black districts by virtue of the non-retrogression principle because Section 5 itself will be reviewed by Congress in 1997 and will expire in the year 2007. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, §2a, 96 Stat. 131, 133 (1982) (codified at 42 U.S.C. §1973b(a)) (Supp. 1993).

Fourth, there is a reasonable relationship between the number of majority-minority voting districts and the number of minorities in the state. J.S. 62a-63a. Thus the goal is reasonably related to the pool of individuals whose votes were previously diluted and hence, who benefit from having an equal opportunity to elect candidates of their choice. Finally, the plan does not unduly burden the rights of third parties because it complies with all applicable constitutional requirements. J.S. 64a.

(b) A redistricting plan does not need to be compact in order to be narrowly tailored.

(1). A state may pursue rational redistricting goals, such as recognizing historical, cultural and economic communities of interest, and preserving the core constituencies of incumbents, at the expense of geographical compactness, which is neither a federal, state or constitutional requirement for congressional districts. *See* J.S. 68a-74a; *Shaw v. Reno*, 113 S.Ct. at 2827. To be sure, a federal court must take action if a redistricting plan fails to give equal weight to the vote of all individuals, *Reynolds v. Sims*, 377 U.S. at 566-67, or dilutes the voting strength of an identifiable group of voters, *Davis v. Bandemer*, 478 U.S. at 109, 124, *Thornburg v. Gingles*, 478 U.S. at 80, or is not grounded in rational districting principles. *Reynolds*, 377 U.S. at 568. However, where a redistricting plan stays within these constitutional and statutory boundaries, the federal courts should not be reordering the state's legitimate

and rational redistricting priorities. The court below correctly interpreted *Shaw v. Reno* to hold that where a state has a substantial basis for concluding that it must create majority-minority districts to comply with the Voting Rights Act, or to remedy past discrimination, lack of compactness does not invalidate the redistricting plan. J.S. 66a.

The plaintiff-intervenors argue that Districts 1 and 12, as enacted are invalid because they fail the *Gingles* compactness standard and are located in a part of the state different from where the "compact" black population resides.[62] Pope Br. at 36-38. This argument is directly contrary to long-standing precedent and established practice in voting rights jurisprudence.

Having decided that anything less that two majority-black districts would likely violate Section 2 of the Voting Rights Act, the General Assembly had the discretion to determine how best to locate those districts and what other non-racial redistricting principles would be followed in their formulation. *See Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977) (reapportionment

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[62]This argument is premised on a fact exactly contrary to what the court below actually held. The district court found that Districts 1 and 12 are generally located in areas of the state where violations of the Voting Rights Act have occurred. J.S. 107a. Of the 552,386 citizens who reside in the First District, 472,168, or 85.5%, reside within counties covered by Section 5 of the Voting Rights Act. J.A. 63, Stip. 112. Section 2 violations were found in 11 of the counties in the First District in *Gingles*, and since then, Section 2 actions have resulted in changes of election method in 21 counties and cities in the district. J.S. 197a. Of the 552,386 citizens who reside in the Twelfth District, 407,547, or 73.8%, live in counties covered by Section 5, or where Section 2 violations were found in the *Gingles* litigation or subsequently. Keech Dep., Tables 8A and 8B and Ex. 578.

is the prerogative of the legislature, which is uniquely positioned to balance varied state policies). As Amici Curiae North Carolina Legislative Black Caucus and North Carolina Association of Black Lawyers explain in greater detail, courts in Section 2 litigation routinely approve less geographically compact districts than are possible because the less compact districts better accommodate a jurisdiction's various competing concerns. In addition, only requiring that majority-black districts be compact has serious constitutional implications. *See* Brief of Amici Curiae North Carolina Legislative Black Caucus et al., at 6-21, 26-30.

Any jurisdiction responding to a Section 2 violation in the course of litigation has the right to propose a remedy that may or may not follow the outlines of the plan introduced by the plaintiffs at the liability stage, and the court is required to give due deference to the jurisdiction's redistricting choices, so long as the plan remedies the violation. *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982); *Wise v. Lipscomb*, 437 U.S. at 540; *White v. Weiser*, 412 U.S. 783, 794-97 (1973).[63] A state voluntarily complying with the Voting Rights Act has the same, if not more, discretion than a jurisdiction judicially compelled to comply would have. *See Voinovich*, 113 S.Ct. at 1156.

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[63]Indeed, the only basis for rejecting a plan proposed by the jurisdiction would be that the plan fragments black voters or proposes majority black districts which do not have a sufficiently high percentage of black voting age population to give black voters a realistic chance to elect candidates of their choice. *Voinovich v. Quilter*, 113 S.Ct. 1149, 1157 (1993) ("federal courts are bound to respect the States' apportionment choices unless those choices contravene federal requirements.") *See, also, Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) *cert. denied*, 498 U.S. 1028 (1991); *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago v. Ketchum*, 471 U.S. 1135 (1985); *U.S. v. Dallas County Commission*, 850 F.2d 1433 (11th Cir. 1988).

Moreover, plaintiff-intervenors' assertion that "members of the group injured by vote dilution could still prove their claim -- regardless of the State's decision to form a district somewhere else" (Pope Br. at 37) is wrong. If the State of North Carolina enacts a plan with two of twelve congressional districts giving black voters an opportunity to elect candidates of their choice, then black voters in the rest of the state, even if they could be combined into a different majority-black district, are not likely to succeed with a Section 2 claim because they would be unable to show that the plan diluted their voting strength.[64]

Under Section 2, the State of North Carolina cannot be required to locate the majority-minority districts in any particular region of the state,[65] and cannot be required to make the districts any particular shape or fit any specific mathematical measure of compactness. It would make no sense to impose restrictions on a state that is voluntarily complying with the Voting Rights Act, in the guise of requiring a voluntary plan to be narrowly tailored, that a court could not require if a Section 2 violation is found and the state is compelled to create majority-black districts.

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[64] *See Johnson v. DeGrandy*, 114 S.Ct. at 2651 (no violation of §2 where minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population).

[65] Plaintiff-intervenors argue that the Solicitor General recognized that a Section 2 remedy must be "connected to the geographically compact group of minorities allegedly injured by vote dilution" during oral argument in *Hays v. Louisiana*, 115 S.Ct. 2431 (1995). In fact, the passage cited refers to a different question altogether, namely whether a plan with non-compact districts can be justified by a compelling state interest in complying with Section 2.

(2). Requiring compactness as an essential element of a narrowly tailored plan would require the state to abandon other legitimate redistricting goals. Evidence in this case showed that urban residents of the compact 3rd District in the Shaw II plan had little in common with the residents of the rural counties joined with it. Thus, requiring a compact majority-black district would indeed require the state to take race and little else into account. It would force the state to combine voters who had less in common into districts with each other, regardless of race. The balancing and prioritizing of redistricting goals is best determined by the elected members of the state legislature rather than federal courts.

North Carolina's majority-black districts do not take race into account more than is necessary to remedy this state's long history of racial discrimination in politics and elections. They are an interim measure which will erode the influence of racial discrimination in elections. J.A. 224-225.

CONCLUSION

The complaint should be dismissed for lack of standing. Alternatively, the decision of the court below should be affirmed because race was not the predominant factor in the creation of North Carolina's congressional districts. Additionally the state had a compelling interest in complying with the Voting Rights Act and remedying past discrimination, which it satisfied with a narrowly tailored redistricting plan.

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